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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 212.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as administrator of the Estate of Joseph Marcone, deceased,
Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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INDEX.

PAGES

Point 1—Negligence Established Against Petitioner 1

Point 2—Decedent Engaged in Interstate Commerce 8

Point 3—Decedent's Death Not Due Solely to His Negligence and to His Disobedience of Orders.. 13

AUTHORITIES CITED

Adriance vs. Palisade Realty Co., 95 N. J. L., 185 7

Austin vs. P. R. R. Co., 82 N. J. L., 416 13

Bennett vs. Busch, 75 N. J. L., 240 12

Erie R. R. vs. Lindquist, 27 Fed. (2nd series), 98 14

Firth vs. P. R. R., 83 N. J. L., 467 7

Grand Trunk Rwy. vs. Lindsay, 233 U. S., 42 17

Harbor vs. Jenkins Rubber Co., 72 N. J. L., 171 10

Harris vs. U. S. S. Co., 75 N. J. L., 861 11

Illanardo vs. Erie R. R., 135 Atl., 77 ..... 6, 10

Illanardo vs. Erie R. R., 137 Atl., 917 ..... 6, 10

Illinois R. R. Co. vs. Skaggs, 240 U. S., 66 17

Krysiak vs. P. R. R. Co., 270 Fed., 785 11

Manziano vs. P. S. Gas Co., 92 N. J. L., 326 14

McCarthy vs. Metropolitan Ins. Co., 75 N. J. L., 887.. 12

McCombe vs. P. S., 95 N. J. L., 187 7

McLaughlin vs. J. Horne Co., 206 Fed., 249 11

Montecalvo vs. Wahl, 97 N. J. L., 559 12

Norfolk & Western Rwy. Co. vs. Earnest, 229 U. S., 114 17

PAGES

Patton vs. P. S. Rwy. Co., 227 Fed., 810 7

Phoenix Mutual Ins. Co. vs. Doster, 106 U. S., 31 11

Pittsburgh C. C. & St. Louis R. R. Co. vs. Edwards, 129 N. E., 310; 20 Neg. & Comp. Cases Annotated, page 342 16

Price vs. N. Y. C. R. R., 92 N. J. L., 429 7

Southern Rwy. Co. vs. McGuin, 240 Fed., 649 6

State vs. Elliot, 94 N. J. L., 76 16

Topere vs. Boston & M. R. R., 103 Atl., 72; Volume 45 of U. S. Code Annotated, 194 7

U. S. Code Annotated, Volume 45, page 306, section 51 13

Voorhees vs. C. R. R., 14 Fed. (2nd series), 899 17

Weston vs. P. R. R., 74 N. J. L., 484 12

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BRIEF FOR RESPONDENT.

It is respectfully submitted, at the outset, that the questions in dispute were not questions to be decided by the Court but were jury questions. While the jury might have drawn the conclusions urged by the petitioner, yet they were not compelled to draw them and this argument is submitted on the theory that the jury could have drawn the conclusions making for liability.

POINT 1.

Negligence established against petitioner.

The testimony adduced by the respondent showed that the decedent was twenty-four (24) years of age (R., p. 71)

and was employed by the petitioner in its roundhouse at Granton, New Durham, New Jersey, as a box packer of journal boxes on engines and a filler of grease cups (R., p. 10). In doing this work of packing boxes, he would go to the different engines on the tracks throughout the roundhouse, and, in fact, he would do whatever work he was told to do by his foreman (R., pp. 37-38).

On the night preceding his death, the decedent had worked on fourteen different engines, among which was engine #3709, which was the engine that caused his death. At about 2:15 A. M., the decedent's foreman had instructed the deceased to work on engine #3835, which engine was on track #7 or adjacent to track #8 on which engine #3709 was being propelled (R., p. 65). His foreman was the last man to have seen the deceased alive, for he was not seen by any one after 2:15 A. M. The instruction given to the decedent was that he was not to leave engine #3835 until his foreman had returned from the farm (R., p. 67). The foreman did not see the deceased again until he was dead (R., p. 65). The decedent was killed by engine #3709, which was on the track next to the one on which the engine was upon which the deceased was working.

The jury might have found the following facts concerning the deceased's death:

There was no warning of the intention to move engine #3709 while the deceased was working in proximity thereto on engine #3835; that the only warning that decedent had to rely on was a blackboard in the roundhouse on which there was marked the time, 3:00 A. M., that engine #3709, which killed him, would be moved, and that the said engine instead of being moved at that time was moved at 2:30 A. M. without any proper warning.

There was a custom of warning the men in the roundhouse of the movement of these engines by writing on

the blackboard the time when these engines would be moved, and the men would govern themselves accordingly (R., pp. 36-104). This system or custom of writing on the blackboard was in vogue during the entire time that the foreman and the decedent were employed at the roundhouse, and this system was still in vogue at the time of the accident (R., p. 46).

There was some testimony that the hostler blew his whistle and rang the bell twice before the engine was moved. When he blew his whistle and rang the bell on the first occasion, the turn table man did not hear them as he was in the pit not expecting the engine out at that time as the notation on the blackboard stated that the engine would not be moved until 3:00 A. M. There was also testimony that all kinds of whistles are blown in the roundhouse, and that you do not know what they mean. It may be that a man is testing the bell and that it did not mean the intended movement of a train (R., p. 13). This also applied as far as blowing of the whistle was concerned (R., p. 14). The hostler was told by the assistant foreman that he should not take the engine out too early, but notwithstanding this warning, the hostler took the engine out five (5) minutes after he was told not to do so (R., p. 39).

The hostler had worked as such for three (3) months, and his duty as a hostler was to bring the engines out of the roundhouse for crews to take them away (R., p. 23). He would take the engine from the roundhouse to the water plug near the master mechanic's office, which is about 300 feet away (R., p. 23). The engine that caused the accident was on track #8 and there were engines on both sides of it, one of the engines had steam and the other was dead (R., p. 25). He got on his engine at about 2:20 A. M., but did not start the engine until 2:30 A. M. (R., p. 27). The engine had travelled a distance of about 35 feet from the roundhouse, that is 35

feet from the rear of the engine, as he was backing out at the time (R., p. 28) when he was stopped by the turn table man. However, he travelled about 60 feet before he came to a standstill (R., p. 28). Although the hostler testified that he looked as he was proceeding with his engine, and there was nothing to prevent him from seeing anyone working on the other engines, yet he said that he saw no one (R., pp. 28-29).

Although the hostler knew that bells were ringing and whistles were blowing all the time, and although he knew that there was a live engine right along his right-hand side, he did not give any warning to anybody that he was going to move the engine, notwithstanding that it was being moved before its schedule time (R., pp. 29-30).

Blood stains were found on the right-hand side of the rail of track #8 adjacent to the track on which the deceased was working. The blood stains went for a distance of about 30 feet from where the body was found, and the body was found about 60 feet from the end of the stall (R., p. 33). There were marks as if something dragged along that rail beginning at a point where the blood stains were found.

Although the hostler testified that his bright light was sufficiently bright to see anyone who might be behind him, yet he did not see the deceased (R., p. 34).

There was a clearance of about 2 feet between the tank of the engine which caused the accident and the tank of the engine on the nearby track on which the decedent was working (R., p. 83).

From all the foregoing evidence, the jury would be justified in finding the following facts:

That the deceased was working on an engine when he was killed; that he was killed because the engine next to the one on which he was working was moved out of the roundhouse, without any warning to him, at a time

other than that on the blackboard which, by reason of the custom of the roundhouse, he had a right to rely on; that the hostler of the engine that killed him made a careless inspection because he was unaware of the presence of the deceased near the moving engine, although it would have been disclosed by a careful inspection; that the deceased was struck by an overhanging moving engine, being close to same, believing that it was stationary at the time it was moved.

The petitioner in its brief says that the hostler made a careful observation—that is simply begging the question. If the decedent was working near the engine that was being moved and the hostler did not see him, the jury could have found that it was not a careful but a careless observation.

The testimony seems to indicate that a whistle was blown and the bell rung on the engine by the hostler, but the evidence is clear that this as a warning was inadequate because everyone testified that the whistles and bells were sounding "all around there" at all times and that the men did not know what they meant (R., p. 13). The men could have relied on the custom in vogue there of placing on the blackboard the time of the moving of the engines. In view of the premature movement of the engine in a backward position, at a time when the deceased had reasonable ground to believe that it would not be moved, and, for that reason, some other notice of precaution should have been taken to warn the decedent, the jury was justified, and it was a question for the jury, that the petitioner had not performed his full duty to the deceased.

As the Court below said, that in view of the moving of the engine before its scheduled time and in view of the fact that the blowing of the whistles and bells meant nothing in the roundhouse, it should have had a guard on the rear end of the engine or some other measure of warning the deceased.

In the case of Illanardo vs. Erie R. R., 135 Atl., 77, affirmed in 137 Atl., 917, Chief Justice Gummere, speaking for the Supreme Court, said:

> "The question for the consideration of the jury in the present case was whether the engineer knew that the plaintiff was opening the roundhouse door and if so, then whether he ought not to have used care to ascertain whether, by running this engine into the roundhouse, before the door thereof was entirely opened, he would thereby jeopardize the safety of the plaintiff and, if that fact was apparent then it was for the jury to say whether he was not under a duty to give notice to the plaintiff of his intended movement of the engine either by the blowing of the whistle or the ringing of the bell (although neither of these things was done under normal conditions) or by taking some other precaution for his protection against injury which might otherwise result to him."

In the case of Southern Rwy. vs. McGuin, 240 Fed., 649, the Court there held:

> "Running a north bound train upon the south bound track is not negligence, but it imposes on the railroad company great precautions to warn employees of the approach of the train, since it must take notice that the employee will be somewhat less on guard against the train coming from that direction."

This answers the petitioner's criticism of the Court below when it stated that it should have had a guard on the rear of the engine inasmuch as the engine was prematurely moved, and the giving of the whistles and bells meant nothing.

The petitioner argues as if the custom of putting the time on the blackboard of the movement of the engine did not mean anything, although the testimony is clear that the men were governed by this blackboard.

In the case of Firth vs. P. R. R., 83 N. J. L., 467, Justice Garrison, speaking for the Court of Errors and Appeals, said:

> "The place of work of a servant was a pit under a locomotive tender, which was a reasonably safe place unless the tender was moved without warning. There was a custom of giving such a warning, but whether it was given as an incident of the work of the master or as the duty of the master to warn the servant was a disputed question. That where the testimony was conflicting and variant inferences could be drawn from it, this question was for the jury."

When an employer makes a rule for the protection of the employees, he admits the reasonable necessity for the conduct thereby prescribed, and a violation of the rule can be found to be negligence, and the master cannot assert that the rule is not necessary.

See Topere vs. Boston & M. R. R., 103 Atl., 72, volume 45 of the U. S. Code Annotated, page 194.

All the cases cited by the petitioner have no bearing on our case at all. In McCombe vs. P. S., 95 N. J. L., 187, there is nothing but the circumstance of the body of Saunders under the car.

In the Adriance case, 95 New Jersey Law, 185, nobody knows or could surmise from the evidence what happened.

In the case of Price vs. N. Y. C. R. R., 92 L., 429, citation taken from the first trial of the Price case, there was no proof of any fact exclusive of presumption.

In Patton vs. P. S., 227 Fed., 810, it was a case of a pedestrian without any violation of any duty by the defendant.

In the case sub judice, the facts showed that the decedent was working on the premises of the petitioner, at a place to which he had been assigned, working adjacent to the track on which the engine that killed him was propelled; we have the blood stains on the side and rail of track #8 near the track on which decedent was working; we have the marks as if something was dragged along the same rail at a point where the blood stains were found; we have the violation of a duty by the premature movement of the engine other than that on the blackboard, and the blowing of whistles and bells, which meant nothing because they were being blown continuously and "all around" the roundhouse.

From all of the facts, it was a question for the jury to decide as to the negligence of the petitioner and it was not a court question.

POINT 2.

Decedent engaged in interstate commerce.

The petitioner in its answer admits that it was engaged in interstate commerce at all times mentioned in the complaint but denies that the respondent, at the time of the accident, was engaged in interstate commerce, on the theory that the decedent was not engaged in any work at the time of his death, although the testimony is clear that the decedent was last seen alive at 2:15 A. M. by his foreman who instructed him to work on engine #3835; that the decedent's tour of duty did not end until 3:00 A. M., and he had been instructed to finish his work on this engine and not to leave until his foreman had returned from the farm, and to await further orders, although the foreman did not know whether there was any further work to be done that morning by the decedent (R., p. 68).

The decedent's death took place at about 2:30 A. M. or 2:40 A. M. and at that time, decedent was within the roundhouse on the premises of the petitioner.

It was a question of fact for the jury, under the circumstances, as to whether or not he had finished his work on this engine. How long before his death he had finished his work, no one knows. It may have been a minute or two minutes, or it may have been that he was looking over his work, which he had finished, to see if it had been properly done, awaiting the return of his foreman.

If he packed interstate engines with grease, and the testimony here warrants the inference that there were no other engines than interstate engines in this roundhouse, then he was engaged in interstate commerce as a matter of law, but upon the facts, at best, it was a jury question.

The petitioner practically concedes that the decedent's work was that of interstate commerce, but its whole theory is that he was engaged in neither interstate nor intrastate commerce because he had finished his work and was at a place where he should not have been. It was a question of fact for the jury as to whether he was engaged in interstate commerce and that, of course, depends upon what he was doing at the time of his death. The only testimony we have is that of the foreman who testified that he instructed the decedent to work on engine #3835, and finish his work on said engine, and await further instructions from him. He was last seen alive by his foreman at 2:15 A. M., when he was given his instructions to finish this engine, so at that time he was not through with his work, but had just began working on said engine.

The mere fact that the foreman testified that, when he went back to examine engine #3835 on which the decedent had been working, all the work on said engine had been completed, still it was a question of fact for

the jury to say whether or not at the time the decedent met his death, he had completed his work, for the jury might have found that the decedent was still in the course of his employment and was looking over his work to ascertain whether he had properly greased the cups, etc., while waiting for his foreman, as he had been instructed to wait for his return from the farm.

The Court could have charged as a matter of law that decedent was engaged in interstate commerce, but instead left it to the jury.

In the case of Illanardo vs. Erie R. R., 135 Atlantic, 77, affirmed by the Court of Errors and Appeals in 137 Atlantic, 917, the Court there held:

> "Laborer at roundhouse used indiscriminately both in interstate and intrastate commerce, injured while opening door to admit an engine, held engaged in interstate commerce and entitled to benefit of federal employers' Liability Act (U. S. Comp. St., Sections 8657-8665), though the engine was not engaged in interstate commerce."

It was admitted that engine #3835, on which decedent was working, was an engine engaged in interstate commerce (R., p. 96). Having been told to finish his work on this interstate commerce engine, and his duties generally were in all kinds of commerce, and his hours of duties not having been completed, and when last seen, about some few minutes before his death, he was working on this interstate engine, at best, it was for the jury to say whether he was engaged in interstate commerce at the time of his death.

The cases cited by the petitioner in its brief are not applicable to the case sub judice. In the Harbor vs. Jenkins Rubber Co. case, 72 N. J. L., 171, the deceased met his death during the noon recess, and proceeded to another part of the employer's grounds out of mere curi-

osity, which part was not provided or customarily used by the employees.

In Harris vs. U. S. S. Co., 75 N. J. L., 861, here the plaintiff on his own volition departed from a safe place provided by the employer and took the dangerous place.

In Krysiak vs. P. R. R. Co., 270 Fed., 785, the decedent had finished his day's work and while going home, chose a dangerous way instead of the safe way provided by his employer.

In the case sub judice, the jury could have found that the decedent's hour of duty had not expired; that he had not finished his work; that some few minutes before he was injured and killed, he was working on engine #3835; that he was at the place where his foreman had placed him, doing his designated work and awaiting further instructions when he had finished this work. It was not a matter of law for the Court but under the circumstances, it was for the jury to decide.

In the case of Phoenix Mutual Ins. Co. vs. Doster, 106 U. S., 31, this Court said:

> "Where a case fairly depends upon the effect or weight of testimony, it is for the consideration and determination of the jury, and it should not be withdrawn from them unless the testimony be of such conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

No one saw the deceased when he was killed, nor did anyone actually see what he was last doing. It was for the jury to say what the deceased was doing at the time he met his death.

In the case of McLaughlin vs. Joseph Horne Co., 206 Federal, Circuit Court Judge McPherson, speaking for the Third Circuit, on page 249 said:

"And a conflict may exist among the witnesses, not only where facts are directly disputed but also where it is uncertain what inferences should be drawn from the facts after these have been established. Inferences of facts are themselves facts and ordinarily the jury must draw them, and not the judge. Especially is this true when the inquiry has to do with the standard of ordinary care, care according to the circumstances, where no previously defined standard exists, and where our system of jurisprudence commits to the judgment of a jury the duty of determining the shifting rule for the particular case."

And citing cases of Grand Trunk Rwy. Co. vs. Ives, 144 U. S., 417; Texas R. R. Co. vs. Harvey, 228 U. S., 319; Slentz vs. Western Co., 180 Fed., 389.

In the case of Montecalvo vs. Wahl, 97 N. J. L., Judge Williams, speaking for the Court of Errors and Appeals, on page 559 said:

"Where fair-minded men honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the jury. It is well settled that the credibility of witnesses is in all cases a question for the jury, and a verdict will not be directed for the defendant if the evidence is conflicting and leaves the mind in a state of some doubt."

To the same effect is the case of McCarthy vs. Metropolitan Insurance Company, 75 N. J. L., 887; Bennett vs. Busch, 75 N. J. L., 240.

In the case of Westen vs. Penn. R. R., 74 N. J. L., 484 (Court of Errors and Appeals), it holds:

"If, under the evidence, reasonable minds may differ as to whether the defendant was negligent or the plaintiff guilty of contributory negligence, the Court cannot take the case from the jury and direct a verdict."

In the case of Austin vs. P. R. R. Co., 82 N. J. L., 416, the Court of Errors and Appeals, said:

"All that is required is that the circumstances be so strong that a jury may properly, on grounds of probability rather than of certainty, exclude an inference favorable to the defendant."

Where the facts are in dispute or more than one inference can be drawn from them, the question that an employee was at the time of receiving the injury sued for engaged in interstate commerce is for the jury.

See cases collected in Volume 45, page 306, section 51 of the U. S. Code Annotated.

POINT 3.

Decedent's death not due solely to his negligence and to his disobedience of orders.

What has been said under Points 1 and 2 practically applies here. It cannot be said as a matter of law that decedent's death was due solely to his negligence and to his disobedience of orders. It was a question of fact for the jury to decide.

The petitioner goes into the realm of speculation when it states in its brief that the "decedent had voluntarily left the place of safety and went to a place where his duty did not require him to go," for there is no such testimony in the record. The deceased when he was last

seen alive was working at the place and on the engine to which he had been assigned by his foreman. The jury could have found that while standing near the track on which the engine which killed him was being moved, either finishing the work he was doing or looking over the work he had completed to see if it was properly done, or if additional greasing was necessary, while awaiting his foreman who had instructed him to wait there, he was struck and killed by this engine which was moving backward out of the roundhouse without warning as it was being moved before its scheduled time.

Inasmuch as the decedent was dead, there is a presumption that he was free from negligence, which the petitioner did not rebut and which would make it a question of fact for the jury.

In the case of Erie vs. Lindquist, 27 Fed. (2nd series), 98, Circuit Court Judge Woolley, speaking for the Third Circuit, said:

> "In an action against railroad for death of fireman, the latter, being dead, is presumed free from negligence though presumption is rebuttable."

It cannot be said that the decedent attempted to commit suicide, for that is what the petitioner's argument amounts to when it states that the respondent placed himself in a position where he could be struck by the backward movement of the engine.

In the case of Manziano vs. P. S. Gas Co., 92 N. J. L., which was an appeal in a compensation case where the only proof adduced was the death of the decedent and the dangerous environment, and that gas from leaks permeated the atmosphere, the Court there said on page 326:

> "In such an environment the natural presumption is that the deceased met death while engaged in

his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose, incompatible with his duty; nor was there any evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption. Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 L., 72; Muzik vs. Erie R. R., 85 L., 129. In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of statutory requirements was deducible, i. e., that death arose out of and in the course of the employment. The Trial Court having thus concluded upon a basis of rational inference, tantamount of legal proof of the fact, requires the affirmance of the judgment."

While it is necessary for the respondent in the case sub judice to prove that the petitioner was negligent in

the respects charged in the complaint, such proof need not be made by direct evidence, but may be made to appear circumstantially, and the question becomes one of fact for the jury.

See case of Pittsburgh C. C. & St. Louis R. R. Co. vs. Edwards, 129 N. E., 310; 20 Neg. & Comp. Cases Annotated, 342.

To the same effect is the case of State vs. Elliot, 94 N. J. L., page 76, which was a case where the deceased was struck by a fast moving, high power Packard car and the only identification of the defendant was made by witnesses who described a car similar to the defendant's which car had struck a human body and which "threw it in the air" and the left mud guard of the car was bent. The Supreme Court held that the jury might reasonably infer that it was the defendant's car which was the instrumentality which caused the homicide. The Court in this case on page 79, remarked:

> "The identification of the car and its driver, under the circumstances was almost necessarily circumstantial, but the rule is indubitable that such testimony may present a case sufficiently cogent and connected to go to the jury and afford a basis for a verdict."

The amount of the verdict in this case was very moderate, and a verdict for the respondent would have warranted a much higher amount. Perhaps this can be accounted by the fact that the jury found that the petitioner was guilty of negligence and that the respondent contributed somewhat to the accident. Whatever the negligence of the decedent may have been, it could not be said as a matter of law that it resulted solely from such negligence; that in the event it resulted in part, no matter how small a part, from the negligence of the petitioner then to that extent it was liable.

In the case of Voorhees vs. C. R. R., 14 Fed. (2nd series), 899, the Third Circuit said:

> "In an action for the death of an employee, killed on the track, where there is negligence tending to show that both decedent and defendant were negligent, the case is one for the jury, as decedent's negligence merely diminishes recovery under the Employer's Liability Act. Section 3, Com. St., 8659."

To the same effect are the cases of Illinois R. R. Co. vs. Skaggs, 240 U. S., 66; Grand Trunk Rwy. Co. vs. Lindsay, 233 U. S., 42. The determination of that liability was a matter solely within the cognizance of the jury. See Norfolk & Western Rwy. Co. vs. Earnest, 229 U. S., 114.

It is respectfully submitted that under all of the facts of the case, the questions presented were for the determination of the jury, and not for the Court, and that there was ample evidence from which the jury could have inferred negligence on the part of the petitioner.

It is respectfully submitted that the judgment below should be affirmed.

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